

Original

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

Provision of Interstate and Inter-
National Interexchange Telecom-
munications Service via the
"INTERNET" by Non-Tariffed,
Uncertified Entities

RM 8775

Comments of

Francis Dummer Fisher

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The petition by ACTA, an association of non-dominant interexchange carriers, asks the FCC for:

- 1) a declaratory ruling that FCC has jurisdiction over the Internet,
- 2) a rule-making as to "permissible communications" over the Internet, and
- 3) an order that Respondents, makers of software that transform voice into data, stop selling the software, construed as providing "telecommunications services".

The petitioners fear that the Internet traffic of the digits into which Respondents' software has converted voice will compete with their own voice transport.

Respondents' Petition should be dismissed.

- 1) the FCC lacks jurisdiction over the Respondent's actions. Selling software does not constitute rendering "telecommunications service".
- 2) the FCC lacks jurisdiction over the Internet as a whole, although the FCC clearly has jurisdiction over some of the carriers whose facilities are used by the Internet.

1) The FCC lacks jurisdiction over Respondents, who are not engaged in "telecommunications service".

Respondents are sellers of software that transforms voice into data, prior to its digital transport. They do not offer "transmission" of any kind. Yet "transmission" is the heart of the definition of "telecommunications service" 47 USC (r)(48) and (51) over which the FCC does have jurisdiction..

The software makers do not fall within the FCC jurisdiction, any more than would the manufacturers or distributors of the computers which engage that software. Motion images are also transported in digital form over the Internet, yet that does not mean the companies selling the equipment that produces images in digital form are engaged either in "telecommunications" or in "cable" television.

It follows that the requested action of "stopping" respondents from providing telecommunications services" is beyond the authority of the FCC.

**2) The FCC lacks jurisdiction over the Internet as a whole.
Petitioner's complaint lies with Congress which in the 1996
Telecommunication Act failed to legislate an overarching scheme of
telecommunication regulation; telephone and cable companies were
continued to be treated separately and the Internet was not addressed.**

Of course, the distinctions between voice, data and video have been overtaken by technology. We observe a fiber optic cable emerging from a building and ascertain that it is transporting digits. But we are unable logically to assign that transport to one service or another. We have to follow the wire down the street until it enters another building where only an old company sign will tell us that we are dealing with "telephone" or "video".

Yet the 1996 Act persisted in the pretense of anachronistic distinctions. "Cable Services" continues to be treated in a separate title of the Act. It thus appears that interconnection over telephone wires is mandated, but interconnection over "cable" wires is not. Municipalities are authorized to levy franchise fees on cable companies that include revenue from providing both transport and content, but franchise fees for telephone companies are applied to revenues from transport but not from sale of content over their wires. Permissible franchise fees for open broad-band networks are not addressed.

Universal service, the requirement to serve all, does not assure that every American will have access to an open broad-band network.

Given the anachronistic legislation, there is no reason to believe that Congress intended to treat with the Internet. Of course, services rendered to the Internet by telecommunications providers are subject to FCC oversight to the same extent as those services provided to others.

Congress did not hesitate to assign new rule-making and regulation-issuance chores to the FCC. Congress could, and maybe should, have asked the FCC to consider the merger of technologies taking place and to advise Congress how the laws might have to be changed to address these developments. Congress knew of the Internet and could have assigned it as a subject for the FCC. But Congress did not. Petitioners now request that the FCC address the Internet in an additional sweeping rule-making. That is asking the FCC to take initiative where Congress has not asked that it be done.

The anomaly that the 1996 Act presents to Petitioners is understandable, but there is no remedy to be had at this time from the FCC.

The appropriate forum for Petitioners to address their concerns is the Congress. Petitioners could ask Congress to assign to the FCC the new tasks of proposing a rationalizing of telecommunications law and of recommending provisions that would bring under the umbrella of "telecommunications" the new merged digital worlds of voice, data, and video. The Petitioners could ask Congress to subject the Internet to FCC jurisdiction. Whether or not that is a good idea can be debated there and then.

Respectfully submitted,



Francis Dummer Fisher

3208 Harris Park Avenue
Austin, TX 78705
512 476-2719
fdfisher@mail.utexas.edu

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